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In these comments I summarise my view of the legal issues involved in the accession of an independent Scotland to the European Union.¹

The United Kingdom's status upon Scottish independence: In the event of Scottish independence, it seems almost certain that *the United Kingdom would be treated as a continuing state* for the purposes of international law and membership of the European Union. In other words, the status of the United Kingdom within the European Union would not change, although there may well be pressure to reduce the degree of representation which the UK enjoys within certain EU institutions.

An important political variable is that the long-term status of the United Kingdom remains uncertain, with the possibility of a referendum on continued membership at some point after the 2015 General Election.

Precedents: There is no clear precedent for Scottish accession. The cases of Algeria and Greenland are often referred to but both are very different from that of Scotland. Scotland, unlike these two territories would be seeking not to leave the EU but to achieve membership. Scotland's situation is also different from those states which joined from outside the European Union with no history of membership and no pre-existing compliance with EU obligations. *On this basis we need to treat Scottish accession as a unique case.*

Accession route - Article 49 or Article 48?: There are two alternative routes by which Scotland could accede to the European Union. Article 49 of the Treaty of European Union is designed for the accession of states from outside the Union. The lengthy and involved process associated with Article 49 might well be considered unsuitable for Scotland's accession since Scotland is already part of a member state, meets the Copenhagen criteria and is fully compliant with the *acquis communautaire*.

An alternative route could possibly be facilitated through Article 48 by way of treaty amendment known as the 'Ordinary Revision Procedure'. This process promises to be less laborious than the Article 49 route. However, Article 48 could still require a convention of Member States to be convened to adopt recommendations on the proposed treaty amendments. Furthermore, the unanimous consent of Member States would be needed by way of ratification by Member States in line with their own domestic constitutions.

In short, whether Article 48 or 49 is used, *any treaty change to effect Scottish membership would require unanimous consent including constitutional ratification by each Member State, in some cases possibly requiring a referendum.*

Timetable: The Scottish Government believes that the process of negotiations of the terms of entry as well as any necessary treaty or treaty amendments can be

¹ These comments are based upon an Evidence Briefing published by the ESRC on 2 December 2013
<http://www.futureukandscotland.ac.uk/papers/accession-independent-scotland-european-union-view-legal-issues>

ratified in the period between the date of the independence referendum on 18 September 2014 and Scotland becoming an independent state in March 2016. *This is not inconceivable but seems to be an optimistic timetable.* In the event that the process is not concluded by March 2016 then the most likely scenario would be some *interim arrangement* being put in place to ensure that Scotland, Scottish citizens and EU citizens residing in Scotland are still covered by the rights and obligations of EU membership in the period prior to formal accession.

Process: if the Article 48 route is to be used, a number of questions concerning the process remain to be fully addressed.

The Article 48 amendment route requires to be initiated by a Member State, the European Commission or the European Parliament, and not, as under Article 49, by the state seeking accession. In this case, a proposal by the United Kingdom would be the most likely route. This would of course depend upon the willingness of the UK to nominate Scotland for membership. The terms of the Edinburgh Agreement suggest that the UK will recognize an independent Scotland in the event of a majority Yes vote. From this we might deduce a willingness to facilitate the Article 48 process, but this has not, to my knowledge, been confirmed by the UK Government.

Given the need for unanimity, the process of ratification by each Member State would also make membership for Scotland contingent upon the various constitutional processes within each Member State, including the possibility of a referendum in certain states. The Scottish Parliament might seek to clarify how quickly this process might be expedited and if any likely impediments stand in the way.

Should the Conservative Party win an overall majority at the 2015 General Election, the UK Government may seek to open treaty negotiations with EU institutions and other Member States concerning the terms of UK membership. How would such endeavours impact upon negotiations to admit an independent Scotland to the EU? Is there any prospect that the two sets of negotiations would be linked?

Terms of Accession: A seemingly less clear issue than the technical process towards membership is the terms upon which Scotland would be admitted to the EU. The UK has concluded a series of protocols or opt outs including membership of the Eurozone (Protocol 15), the Schengen Area (Protocol 19), the British Isles Common Travel Area (Protocol 20) and Justice and Home Affairs (Protocol 21). Important questions here include the extent to which an independent Scotland would seek to retain some or all of these opt outs and the attitude of the European Union to such an approach. Another issue is the degree of representation Scotland would gain in the EU institutions and whether, and if so to what degree, UK representation would diminish. The Scottish Parliament may wish to seek clarification in relation to each of these dimensions.

Inter-governmental agreement: It would be in the interests of voters in the referendum if both the Scottish and UK Governments were to set out their respective positions as fully as possible in relation to outstanding questions relating to Scotland and the European Union. In an advice paper relating to the

referendum question, the Electoral Commission has stated: 'We recommend that both Governments should agree a joint position, if possible, so that voters have access to agreed information about what would follow the referendum. The alternative - two different explanations – could cause confusion for voters rather than make things clearer.'² It would indeed be beneficial to voters if both governments were to work together to explain how they anticipate Scotland's EU membership being effected and addressing areas of common concern, for example in relation to opt outs. Further information from the European Union might also be sought in answer to some of the questions raised above.

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² Electoral Commission, Referendum on Independence for Scotland: Advice of the Electoral Commission on the proposed referendum question, 30 January 2013, para 5.43.
http://www.electoralcommission.org.uk/__data/assets/pdf_file/0007/153691/Referendum-on-independence-for-Scotland-our-advice-on-referendum-question.pdf